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No. 04-154

In the Supreme Court of the United States

MEDIA GENERAL OPERATIONS, INCORPORATED, DBA RICHMOND TIMES-DISPATCH, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that the union's pre-election circulation of a petition signed by employees to express their support publicly for the union did not interfere with employee free choice in selecting the union as their bargaining representative, and therefore did not warrant setting aside the election.

2. Whether the National Labor Relations Board reasonably found that the union made a valid bargaining demand when it filed an unfair labor practice charge that clarified that an earlier request to bargain made by its local affiliate was made on the union's behalf.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 360 F.3d 434. The decision and order of the National Labor Relations Board (Board) in the unfair labor practice proceeding (Pet. App. 25a-36a) is reported at 338 N.L.R.B. No. 126. The Board's underlying decision and certification of representative (App., *infra*, 1a-2a) is unreported. The regional director's order denying a motion for reconsideration (App., *infra*, 3a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2004. A petition for rehearing was denied on May 4, 2004 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on August 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner publishes the Richmond Times-Dispatch, a daily newspaper, and maintains a production facility in Mechanicsville, Virginia. Pet. App. 29a. Pursuant to a stipulated election agreement between petitioner and the International Association of Machinists and Aerospace Workers, AFL-CIO (Union or International Union), the Board conducted a secret-ballot election among petitioner's maintenance employees on September 22, 2000, which the Union won by a vote of 16 to 15. *Id.* at 3a, 6a.

On September 29, 2000, petitioner filed objections with the Board's acting regional director alleging, *inter alia*, that the Union had violated "established law" by circulating a "Vote Yes" petition among employees before the election. Pet. App. 6a.[1] Petitioner submitted affidavits alleging that, about nine days before the election, the Union began circulating the petition among the employees for their signature. *Id.* at 3a. The petition stated, in part, that the signing employees "have made a commitment * * * to vote YES" in the election, and "AUTHORIZE the [Union] to use this

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[1] Petitioner also alleged that the Union engaged in a variety of improprieties in the solicitation and circulation of the petition. See Pet. App. 6a, 12a-16a. The court of appeals rejected those contentions (see *id.* at 12a-16a), and petitioner has not renewed them in this Court.

petition THROUGH ANY METHOD to urge our co-workers to vote YES." *Id.* at 4a, 40a, 42a. The day before the election, the Union distributed throughout the workplace copies of the petition containing the signatures of 20 employees. *Id.* at 5a.

After conducting an investigation, the Board's acting regional director issued a report recommending that the Board overrule petitioner's objections. Pet. App. 6a. Petitioner filed a motion for reconsideration alleging that the Union had engaged in objectionable election conduct proscribed by *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). In *Savair*, the Court held that a union engaged in objectionable conduct by inducing employees to sign recognition slips before an election by offering to waive initiation fees only for those employees who signed the slips. *Id.* at 277-281. The regional director denied the motion for reconsideration, explaining that *Savair* was inapplicable because "the actions of the Union did not involve inducements." App., *infra*, 4a. Moreover, the regional director noted that the Union had asked the employees to sign a petition that "on its face expressly authorized the Union to use it through any method to urge co-workers to vote yes." *Id.* at 5a.

Petitioner filed with the Board exceptions to the report and to the order denying reconsideration. On January 24, 2001, the Board adopted the findings of the report and the order denying reconsideration, overruled petitioner's objections, and certified the Union as the employees' exclusive bargaining representative. App., *infra*, 1a-2a; Pet. App. 7a, 30a.

2. On February 15, 2001, the Union's local affiliate, Richmond Lodge No. 10, sent petitioner a letter requesting information "relative to the IAM bargaining unit" and asking for available dates to begin bargaining.

Pet. App. 27a-28a, 46a-51a. On March 13, 2001, petitioner replied by letter stating that it would not "recognize or bargain with your union." *Id.* at 7a, 27a-28a. On April 2, 2001, the Union filed an unfair labor practice charge with the Board that stated:

> The NLRB conducted an election that resulted in [the Union's] receiving a majority of the vote and, after much delay b[y] the Employer's attorney, the NLRB issued a Certification of Representative on January 24, 2001. On February 15, 2001, the [Union] requested negotiations begin * * * and the Employer declined our request on March 13, 2001.

Id. at 44a. Acting on the charge, the Board's General Counsel issued a complaint alleging that petitioner's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5) and (1). Pet. App. 25a. Petitioner filed an answer in which it asserted that it was "under no duty to bargain with [the Union] as the certification election was tainted by [the Union's] objectionable conduct." *Id.* at 8a.

The Board granted summary judgment in favor of the General Counsel, finding that petitioner's refusal to bargain on and after April 2, 2001, violated the Act, and ordering petitioner to bargain with the Union. Pet. App. 26a-29a. The Board rejected petitioner's contention that the International Union had never made a bargaining demand. *Id.* at 28a. The Board found that, "even if the February 15 letter" from the local affiliate "was not, in itself, a sufficient demand by the International Union, the refusal-to-bargain charge filed by the International Union on April 2, 2001, which referred to that letter, clarified any ambiguity as to which entity was requesting bargaining." *Ibid.* The Board observed

that the Union's charge "clearly alleged" that the February 15 letter had requested that petitioner begin bargaining and that petitioner had declined "our request." *Ibid.* The Board concluded that "the charge, together with the letter, constituted a valid demand for bargaining by the International Union." *Id.* at 28a-29a. On April 23, 2003, petitioner filed a motion for reconsideration and a motion to stay the Board's order, both of which the Board denied. *Id.* at 9a.

3. The court of appeals enforced the Board's order and denied petitioner's cross-petition for review. Pet. App. 1a-24a.

a. The court rejected petitioner's contention that the "Vote Yes" petition was "inherently coercive" under *Savair*. Pet. App. 11a-12a. The court explained that "the linchpin of *Savair* is the linkage between the offer to waive the initiation fee and a pre-election commitment to support the union. It is this linkage that constitutes the union's impermissible interference in the election." *Ibid.* (quoting *NLRB* v. *VSA, Inc.*, 24 F.3d 588, 593 (4th Cir.), cert. denied, 513 U.S. 1041 (1994)). "Here," the court concluded, "the International made no offer to waive the union fees or dues of signing employees, and the [*Savair*] decision is easily distinguishable." *Id.* at 12a.

b. The court also rejected petitioner's contention that the Union did not make a valid bargaining demand. Pet. App. 18a-19a. The court noted that it had previously "held that an inadequate request to bargain (a telephone call by a union agent), plus the filing of an unfair labor practice charge, constituted a valid bargaining demand." *Id.* at 19a. The court explained that in this case, "the February Letter, standing alone, may have constituted an inadequate bargaining request, but it did not stand alone." *Ibid.* Rather, "the Board found

that any ambiguity as to which entity was requesting to bargain for the employees at Mechanicsville was clarified when the International filed its unfair labor practice charge against Media General on April 2, 2001, adopting the February Letter." *Ibid.* The court concluded that the "Board's finding on this point is supported by substantial evidence." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. Petitioner errs in contending (Pet. 14-16) that the court of appeals' decision conflicts with *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). As noted, *Savair* held that a union engaged in objectionable election conduct by offering to waive the initiation fees for employees who signed recognition slips before the election. *Id.* at 277-281. The Court explained that "permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election" would allow "the union to buy endorsements and paint a false portrait of employee support during its election campaign." *Id.* at 277. "In addition," the Court noted, some employees, after accepting the inducement, "would feel obliged to carry through on their stated intention to support the union." *Id.* at 277-278.

The court of appeals correctly held *Savair* to be "easily distinguishable" from this case. Pet. App. 12a. Here, the Union did not offer employees an economic or other inducement to sign the "Vote Yes" petition. As the court explained, absent a linkage between an

inducement and a pre-election commitment to support the Union, the principles of *Savair* are not implicated.

Petitioner also contends (Pet. 14, 16) that the Board's decision in this case is "arbitrary and inconsistent" with the Board's "interpretation of *Savair*" in *Fermont*, 286 N.L.R.B. 920 (1987). Petitioner is barred from raising that claim in this Court because petitioner failed to urge such an objection before the Board and has alleged no "extraordinary circumstances" excusing its failure to do so. 29 U.S.C. 160(e); see *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Petitioner raised that issue for the first time in its reply brief in the court of appeals, and the court did not address it. See *United States* v. *Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004) (contentions not raised in the opening brief are abandoned).

In any event, the Board's decision is not inconsistent with *Fermont*. In *Fermont*, the employer sponsored a contest asking employees to "point out something good about [the employer] or why everyone should VOTE NEITHER" in the election between two unions. 286 N.L.R.B. at 920. Prizes included a 19-inch color television, a microwave oven, and a food processor. *Ibid.* On the morning of the election, the employer gathered the employees together, presented the entries, announced the winners, and asked the winners to come forward and receive their prizes. *Ibid.* "On this record," the Board found, "it is obvious that the [employer] was buying endorsements," as proscribed by *Savair*. *Ibid.*

Petitioner incorrectly asserts (Pet. 15-16) that the Board in *Fermont* recognized that a *Savair* violation may be found without an unlawful inducement and

based solely on employees' "sense of obligation to vote in accordance with expressed sentiments, be they an individual's sentiments, or the sentiments of a co-worker." Neither the holding of *Fermont* nor the language quoted by petitioner (Pet. 15) supports that assertion. To the contrary, the Board, relying on *Savair*, explained in the quoted language that it is the offer of economic inducements for pre-election support that gives rise to a false indication of support for the union and a sense of obligation on the part of some employees "to carry through on their stated intention to support the union." *Savair*, 414 U.S. at 278; see 286 N.L.R.B. at 920-921.

Indeed, after *Fermont*, the Board has continued to recognize that *Savair* applies only where there is an inducement in exchange for pre-election support. For instance, in *Nu Skin International, Inc.*, 307 N.L.R.B. 223 (1992), the Board found that there was no *Savair* violation where a union offered employees a "Union Yes" T-shirt if they signed a "Vote Yes" petition for the union's use in the election campaign. The Board concluded that the T-shirts "would not reasonably induce nonsupporters to sign the petition" because the T-shirts were "inexpensive items" that "would reasonably be desirable only to employees who favored the [u]nion and wanted to proclaim their prounion view." *Id.* at 223-224. See also *Keeler Die Cast* v. *NLRB*, 185 F.3d 535, 538-539 (6th Cir. 1999) (upholding Board's conclusion that *Savair* is inapplicable where no inducement was offered for signing a "Vote Yes" petition), cert. denied, 529 U.S. 1018 (2000). Accordingly, the court correctly upheld the Board's overruling of petitioner's election objection.

2. Petitioner argues (Pet. 17-27) that the court of appeals erred in holding that the Union made a valid

bargaining demand. That claim lacks merit and does not warrant review.

a. Section 8(a)(5) of the NLRA (29 U.S.C. 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees." An employer's duty to bargain is triggered by the union's request for bargaining. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 52-53 (1987).[2] If the union's request is vague, ambiguous, or confusing, the Board may properly find that the union did not make a valid demand. See, *e.g.*, *United Elec. Workers* v. *NLRB*, 986 F.2d 70, 76 (4th Cir. 1993). Where an initial request is unclear, however, the Board, with court approval, has found that the employer's duty to bargain is subsequently triggered when the union files an unfair labor practice charge that clarifies the earlier request. See *RC Aluminum Indus., Inc.* v. *NLRB*, 326 F.3d 235, 243 (D.C. Cir. 2003); *NLRB* v. *Williams Enters., Inc.*, 50 F.3d 1280, 1286 (4th Cir. 1995).

Under those settled principles, the court of appeals correctly upheld the Board's finding that the unfair labor practice charge filed by the Union, together with the letter requesting bargaining previously sent by the Union's local affiliate, constituted a valid demand for

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[2] A "valid request to bargain need not be made in any particular form * * * so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees." *NLRB* v. *Williams Enters., Inc.*, 50 F.3d 1280, 1286 (4th Cir. 1995) (quoting *Stanford Realty Assocs., Inc.*, 306 N.L.R.B. 1061, 1066 (1992)). See also *Peters* v. *NLRB*, 153 F.3d 289, 299 (6th Cir. 1998); *NLRB* v. *Fosdal*, 367 F.2d 784, 788 (7th Cir. 1966); *Scobell Chem. Co.* v. *NLRB*, 267 F.2d 922, 925 (2d Cir. 1959); *Marysville Travelodge*, 233 N.L.R.B. 527, 532 (1977), enforced *sub nom. NLRB* v. *Cofer*, 637 F.2d 1309 (9th Cir. 1981).

bargaining by the Union. The Union's charge referred to the earlier letter and alleged that petitioner denied "our request" to bargain. Pet. App. 44a. In those circumstances, the court properly upheld the Board's determination that any ambiguity regarding which entity was requesting bargaining was clarified when the Union filed its unfair labor practice charge referencing the February 15 letter. See *id.* at 19a.

b. Contrary to petitioner's contention (Pet. 17-21, 24), the court of appeals' holding that the Union made a valid bargaining demand is not in conflict with the established principles that an international union and its local affiliate are separate and distinct labor organizations, that no automatic agency relationship exists between them, and that such entities are not interchangeable for purposes of an employer's recognition of an exclusive, certified bargaining representative. Indeed, the court correctly acknowledged that "a local union affiliate, for purposes of the exclusivity of bargaining requirement, is an entity separate and distinct from its international parent." Pet. App. 18a. The court also quoted its holding in *United Electrical Workers*, 982 F.2d at 75-76, that, under the facts in that case, "an employer was not required to bargain with either the international or its local affiliate when the employer was confused about whether the demand came from the union's local affiliate, which was certified, or from the parent international union, which was not certified." Pet. App. 18a. Petitioner's actual disagreement, therefore, is with the court's conclusion in this case that the Union was the entity requesting

bargaining.[3] That fact-bound disagreement does not warrant further consideration by this Court.[4]

Because the Union's unfair labor practice charge clarified that the local affiliate's bargaining request was on the Union's behalf, this case is distinct from cases cited by petitioner (Pet. 20-21) in which an uncertified union sought to "inject itself . . . into a labor relationship where there is a certification." *Newell Porcelain Co.*, 307 N.L.R.B. 877, 878 (1992) (citation omitted), enforced *sub nom. United Elec. Workers* v. *NLRB*, 986 F.2d 70 (4th Cir. 1993). In *Newell Porcelain*, the employer was asked to recognize an uncertified union, which refused to clarify that the demand was on behalf of the certified entity. 307 N.L.R.B. at 878. See *International Union, United Auto Workers* v. *NLRB*, 394

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[3] The Union's use of its local affiliate to send the initial letter on its behalf was neither inappropriate nor uncommon. See *CCI Constr. Co.*, 326 N.L.R.B. 1319, 1319 (1998) ("It is * * * well established that an exclusive [bargaining] representative 'is empowered to designate and authorize agents, including other labor organizations, to act on its behalf.'") (quoting *United States Postal Serv.*, 310 N.L.R.B. 391, 391 (1993)).

[4] Petitioner fails to acknowledge the Board's finding (Pet. App. 30a) that petitioner's refusal to bargain commenced only as of April 2, 2001, the date the Union filed the unfair labor practice charge. Because there is no finding that petitioner unlawfully refused to bargain solely on the basis of the February 15 letter, many of petitioner's arguments are wide of the mark. For example, this case does not implicate the issues of whether, prior to the filing of the unfair labor practice charge, the Union designated its local affiliate to bargain as its agent or notified petitioner of any such designation. See Pet. 20-22. For the same reason, there is no merit to petitioner's assertions (Pet. 26, 27) that the Board held that the charge "retroactively" put petitioner on notice of a delegation to the Union's local affiliate or that the Board's decision would require employers to risk violating the NLRA by bargaining with an uncertified entity.

F.2d 757, 760-761 (D.C. Cir.) (employer excused from bargaining with uncertified local union that formally requested recognition as the employees' exclusive bargaining representative, where international union was certified), cert. denied, 393 U.S. 831 (1968).

c. Petitioner errs in contending (Pet. 27) that the court of appeals held that an unfair labor practice charge, standing alone, constitutes a bargaining demand. The court did not so hold. Rather, it held that the February 15 letter and the unfair labor practice charge together constituted a valid bargaining demand. See Pet. App. 19a. Contrary to petitioner's assertion (Pet. 27), therefore, the decision below is consistent on that score with *RC Aluminum*, where the D.C. Circuit observed that it did not need to "go so far as" to say "that a charge alone could constitute a valid demand." 326 F.3d at 243. Here, it was similarly unnecessary for the court to reach that issue, and it did not do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2004

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE 5-RC-15077

MEDIA GENERAL OPERATIONS, INC. d/b/a RICHMOND TIMES-DISPATCH, EMPLOYER

AND

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, PETITIONER

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three member panel, has considered objections to an election held on August 25, 2000, the Acting Regional Director's report recommending disposition of them, and the Regional Director's Order Denying the Employer's Motion for Reconsideration of the Acting Regional Director's report. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 16 ballots for and 15 ballots against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Acting Regional Director's and Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that majority of the valid ballots have been cast for International Association of Machinists & Aerospace Workers, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time maintenance machinists, HVAC technicians, electro mechanical technicians, electronic technicians, maintenance utility workers, maintenance mechanics, electrical technicians and facilities systems technicians employed by the Employer at its Hanover County, Mechanicsville, VA facility; but excluding all other employees, office clerical employees, professional and managerial employees, watchmen and guards and supervisors as defined in the Act.

Dated, Washington, D.C., January 24, 2001.

_____

John C. Truesdale, Chairman

_____

Peter J. Hurtgen, Member

_____

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 5

CASE 5-RC-15077

MEDIA GENERAL OPERATIONS, INC. d/b/a RICHMOND TIMES-DISPATCH, EMPLOYER

AND

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, PETITIONER

ORDER DENYING MOTION FOR RECONSIDERATION

The Employer's Motion for Reconsideration of the Acting Regional Director's Report on Objections has been carefully considered. The Employer's Motion is denied. As explained below, the Employer fails to raise a substantial and material issue with respect to the circumstances surrounding the signing or distribution of the employee petition sufficient to warrant a hearing.

The Employer argues that the Acting Regional Director erred by failing to conclude that Richard G. Tingler's name on the "We Are Voting Yes" petition at issue was a forgery. The Employer acknowledges, however, that it did not produce a timely handwriting exemplar from employee Tingler in support of its objections. The Employer also concedes what is obvious, that is, William B. Slayton signed his name in cursive in the space next to where Richard Tingler signed his name in printed form, and then Mr. Slayton again printed and signed his name two lines below. In

addition, the exemplars of Mr. Tingler's hand-printed name in the Appendixes attached to the Employer's Motion for Reconsideration fail to establish a forgery. In fact, an examination of the hand-printed exemplars and Mr. Tingler's hand-printed name on the petition reveals that the writings appear to be virtually identical. Most importantly, however, Mr. Tingler confirmed during the Region's investigation of the Employer's objections that he placed his name on the petition and that no one coerced him to do so. That fact remains unquestioned and unrebutted. In these circumstances, the Employer's contention that it was prejudiced by denial of a hearing on this issue lacks merit.

Apart from the alleged forgery, the Employer also argues that the Union somehow improperly used an employee petition to paint a false portrait of employee support during the election campaign. In making this argument, the Employer relies on *NLRB v. Savair*, 414 U.S. 270 (1973), and its progeny. *Savair* and progeny are inapposite. The Supreme Court in *Savair* condemned the union's preelection tactic of offering to waive initiation fees for employees who signed authorization cards before the election. The Court found this to be an improper inducement, since it would allow unions to "buy endorsements and paint a false portrait of employee support during its election campaign." Id. at 277. Where, however, the offer is not limited to those who sign authorization cards before the election, but also is available to employees who sign cards after the election, the offer is not objectionable. Id. at 274 n.4. In the instant case, the actions of the Union did not involve inducements or coercion. The Union did not offer any inducements or confer or promise any benefits in its effort to ascertain the level of its support among

employees. Rather, it asked them to sign the "We Are Voting Yes" petition, which on its face expressly authorized the Union to use it through any method to urge co-workers to vote yes. There is no evidence to support the Employer's contention that "[t]he union 'railroaded' sixteen employees to vote "yes" in the election by inducing them to sign their petition, then using it against them on the eve and morning of the vote." Although some employees may have been influenced to sign the petition by the group dynamic or even a feeling of peer pressure, and then have had second thoughts about having done so, there is no requirement that such employee petitions be signed in solitary sanctity such as accompanies the marking of ballots in a Board-conducted election. As the Employer correctly explained to employees in its September 20 memorandum, the petition "means nothing"; voters have the "absolute right" to vote "yes" or "no" in the Board-conducted secret ballot election regardless of whether they signed the petition.

Finally, the Employer's reliance on *Comcast Cablevision-Taylor v. NLRB*, [232 F.3d 490], 2000 WL 1692757 (6th Cir. 2000), and *Harborside Healthcare v. NLRB*, 230 F.3d 206 (6th Cir. 2000), is misplaced. Unlike the court's finding in *Comcast*, here the Petitioner made no promise of benefit. In *Harborside*, the court found that a supervisor's active support of, and solicitation of authorization cards for, the union required that the election be set aside. No supervisory involvement is alleged here. Hence, even assuming the Sixth Circuit precedents properly are considered in this

proceeding,[1] their application does not require a different result.

In sum, although the election was decided by only one vote, the evidence proffered in support of the Employer's Objections and Motion for Reconsideration raises no substantial and material issues that warrant a hearing or departure from the recommendation that a Certification of Representative issue.

Dated at Baltimore, Maryland this 27th day of December, 2000.

/s/ WAYNE R. GOLD
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[1] In this regard, I note that this proceeding arises within the geographic area served by the United States Court of Appeals for the Fourth Circuit.